Supreme Court, U.S.
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NO 92-1713

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

LORAIN BOARD OF EDUCATION, et al.,
Petitioners,

v.

OHIO DEPARTMENT OF EDUCATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

This school desegregation action was initiated by Complaint filed by Petitioner Lorain NAACP and others in September of 1979. The Defendants were Petitioner Lorain Board of Education ("Lorain Board") and its individual members, the Ohio State Board of Education and its individual members, the Ohio Superintendent of Public Instruction, and Respondent, the Ohio Department of Education ("Ohio Department").

The Complaint was filed after the Lorain Board had closed a single school building, resulting in a disproportionate impact on Black and Hispanic students. Officials at the Ohio Department were of the opinion that the Co-Defendant, the Lorain Board, could be found liable as a result of this action. *Lorain NAACP v. Lorain Bd. of Educ.*, 979 F.2d 1141, 1152 (6th Cir. 1992) (A.20).[1] However, because of the unique circumstances leading up to the Complaint and the fact that the State Board of Education and the Ohio Department were not made aware of these circumstances, officials at the Ohio

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[1] Petitioners misstate the record by relying on the testimony of one of the Ohio Department's witnesses and cite to the District Court, *Lorain NAACP v. Lorain Bd. of Educ.*, 768 F. Supp. 1224, 1238 (1991) (A.56), in support of the proposition that the Ohio Department "was anxious to settle [this litigation] to avoid the heavy costs of litigation and the certainty of an adverse verdict." (Pet. at 19). In fact, the Sixth Circuit found it necessary to address this particular statement of the District Court directly and concluded:

> [A]s a "finding of fact" [this declaration] not only runs counter to the express provision of the consent decree, but appears to improperly delve into the State's motivation for compromise and *misstates the record.*

979 F.2d at 1152 (emphasis added) (A.20).

Department believed that the State's potential liability was not consistent with the previous Ohio school desegregation cases. *Id.*[2]

After extensive discovery and settlement discussions, the parties entered into a Consent Decree filed and approved by the District Court in August of 1984. (A.77-94). No trial was ever conducted, and no liability on the part of any of the Defendants was either admitted or established.

The Consent Decree included a Goal Statement which required the Lorain Board to "[e]liminate racially identifiable schools" and "[a]ssign students to school attendance areas so that each school will establish a composite minority student ratio of no more than a deviation of +20 or -15 percent from the District Average percentage of each identifiable minority's student racial composition." (A.83).

The Goal Statement also included a provision concerning

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[2] In previous school desegregation cases filed in Ohio, the State's liability was premised on the conclusion that State education officials had known about the school districts' intentional discrimination and segregative acts and continued to provide state funding to the districts. *See Penick v. Columbus Bd. of Educ.*, 429 F. Supp. 229 (S.D. Ohio 1977), *aff'd*, 583 F.2d 787 (6th Cir. 1978) *aff'd in part and remanded in part*, 443 U.S. 449 (1979), *on remand*, 519 F. Supp. 925 (S.D. Ohio 1981), *aff'd*, 663 F.2d 24 (6th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982); *Reed v. Rhodes*, 422 F. Supp. 708 (N.D. Ohio 1976), *remanded without opinion*, 559 F.2d 1220 (6th Cir. 1977), *on remand*, 455 F. Supp. 546 (N.D. Ohio 1978), *supp. opinion*, 455 F. Supp. 569 (N.D. Ohio 1978), *later proceeding*, 581 F.2d 570 (6th Cir. 1978), *aff'd in part*, 607 F.2d 714 (6th Cir. 1979), *cert. denied*, 445 U.S. 935 (1980), *on remand*, 500 F. Supp. 404 (N.D. Ohio 1980), *aff'd*, 662 F.2d 1219, (6th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982); *Brinkman v. Gilligan*, 503 F.2d 684 (6th Cir. 1974), *appeal after remand*, 518 F.2d 853 (6th Cir. 1975), *cert. denied*, 423 U.S. 1000 (1975), *appeal after remand*, 539 F.2d 1084 (6th Cir. 1976), *vacated sub nom. Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406 (1977), *on remand*, 561 F.2d 652 (6th Cir. 1977), *on remand*, 446 F. Supp. 1232 (S.D. Ohio 1977), *rev'd*, 583 F.2d 243 (6th Cir. 1978), *aff'd sub nom. Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526 (1979), *later proceeding*, 610 F. Supp. 1288 (S.D. Ohio 1985), *remand without opinion*, 835 F.2d 877 (6th Cir. 1987), *remand without opinion*, 835 F.2d 878 (6th Cir. 1987).

bilingual programs aimed at the Lorain City School District's Hispanic students. (A.83). Specifically, the Consent Decree required the Lorain Board to retain an independent contractor to evaluate its existing programs, to eliminate any shortcomings discovered in the evaluation process and implement modifications, and to maintain bilingual programs for Hispanic students. (A.83).

Finally, the Goal Statement required the Lorain Board to achieve a hiring goal for all staff equal to the "minority/ majority ratio of the adult population in Lorain in the year of achievement." (A.88). By 1991, all the goals of the Consent Decree had been achieved except the one pertaining to hiring of minority employees. *Lorain NAACP v. Lorain Bd. of Educ.*, 768 F. Supp. 1224, 1234 (N.D. Ohio 1991) (A.47).

The Consent Decree clearly identified the role each party was to play in implementing desegregation in the Lorain City School District. Contrary to Petitioners' contentions, the Defendants, the Lorain Board and the Ohio Department, did not agree to share equally the costs of desegregating the Lorain City School District. (Pet. at 8-9, 10, 20, 21, 25). In fact, the financial obligation of the Ohio Department was expressly limited to making a specific contribution over seven school years, 1984-85 through 1990-91, that represented the lesser amount of either 50 percent of the cost of desegregation or one million dollars. (A.80).

Petitioners rely on a partial quotation of paragraph 4 of the Consent Decree in order to claim ambiguity regarding the intent of the parties concerning the Ohio Department's funding obligation. (Pet. at 25). However, when the provision is read in its entirety it is abundantly clear no ambiguity exists. The pertinent language on the funding obligation of the parties is as follows:

> 4. The State of Ohio will pay to the Lorain City School District 50 percent of the expenses incurred by the Lorain City School District in designing, implementing, administering and maintaining educationally sound programs reasonably

> expected to reduce racial isolation to the standards defined in the Goal Statement. The State of Ohio will pay 50 percent of the unreimbursed expenses attributed to the transportation of students who are being transported for the reduction of racial isolation. "Unreimbursed expenses" shall mean the portion of this expense which remains after deducting the state transportation reimbursement applicable to students involved in such transportation.
>
> The total of the expenses referred to above shall be limited to those incurred during the seven school years 1984-85 through 1990-91, and *the State of Ohio payments shall not exceed $1 million during the seven year term, or 50 percent of the actual reduction of racial isolation costs, whichever is less.*
>
> Beginning in December 1984, payments made by the State shall be made semi-annually in the months of December and June upon the submission of vouchers covering costs actually incurred by the Lorain City School District. Such payments shall be in addition to all other state and federal funds to which the Lorain City School District may be entitled under law and regulations existing at the time of the submission of the vouchers.

(A.80) (emphasis added).

With regard to the bilingual program, the Ohio Department's obligation was specified as follows:

> The cost of such evaluation shall be considered part of the cost of implementation of the Consent Decree and *up to 50 percent of the cost shall be reimbursed by the State of Ohio as provided in Item No. 4 of the Consent Decree.*

(A.83) (emphasis added). Thus, the funding to be provided by the Ohio Department was firmly in place and fixed to a maximum of one million dollars, with the only reimbursable cost associated with the bilingual program being the independent evaluation.

No attempt was made, by either the Lorain Board or the Ohio Department, to calculate the costs of implementing the desegregation plan at the time the funding provisions of the Consent Decree were negotiated. Indeed, at the time the Ohio Department agreed to pay fifty percent of the Lorain Board's costs up to one million dollars, the Lorain Board had not even decided on the method it was going to utilize to desegregate its school district. That decision was not made until the parties were unable to agree on a plan to be utilized to achieve the objectives of the Consent Decree, and the District Court directed the Lorain Board to present a revised proposed plan for implementation.

The Proposed Plan, with some modifications, was adopted by Memorandum Opinion and Order issued April 1, 1985. The Proposed Plan identified six schools that were out of compliance with the student racial composition requirement of the Consent Decree, and identified 654 as the number of students that needed to be moved to achieve the requisite racial composition. Under the Proposed Plan, the Lorain Board chose to use magnet schools as the method for moving students and achieving the racial composition goals.

On January 29, 1990, the Lorain Board filed a Motion for an Order Requiring the Defendant State Board of Education to Increase its Share of the Costs of Implementing and Completing the Desegregation Plan. ("Lorain Board's Motion"). Neither the Lorain NAACP nor the Coalition for Hispanic Issues and Progress ("CHIP"), which was granted leave to intervene in the action in April of 1989 to represent the interests of the Hispanic students and community in the Lorain City School District, joined in the motion.

On May 24, 1990, the District Court issued an Order denying the Lorain Board's Motion, finding that:

> The language of the Consent Decree clearly limits the State's financial exposure to the cost of the desegregation plan incurred during the seven school years 1984-85 through 1990-91 to $1 million dollars or 50 percent of the actual cost, whichever is less. There is no provision in the Consent Decree for increased contribution on the part of the State should the cost of the desegregation plan exceed the original estimate.

The District Court went on to apply the standard set forth in *Heath v. DeCourcy,* 888 F.2d. 1105 (6th Cir. 1989) (*"Heath I"*), *following remand,* No.91-3778/92-3317, 1993 U.S. App. LEXIS 9933, (6th Cir. April 30, 1993) (*"Heath II"*), for modifying a consent decree and found:

> The goal of the Consent Decree at issue in this case is to desegregate the Lorain school system pursuant to the terms set out in the Consent Decree and to maintain an effective bilingual program. While the greater than anticipated cost of the program may constitute a changed circumstance, it does not go to the heart of the purpose of the Consent Decree.

The Lorain Board filed a Motion for Reconsideration of the District Court's May 24, 1990, Order. The Ohio Department opposed the motion for reconsideration, and on July 26, 1990, the District Court conducted a hearing. After the hearing and submission of post-hearing briefs, the District Court on August 17, 1990, directed the Lorain Board and the Ohio Department to enter into discussions for the purpose of renegotiating the Consent Decree. The Co-Defendants were further directed, if unable to reach agreement, to submit their own respective proposals to the District Court. Following clarification from the District Court that this was not a final appealable Order, the Ohio Department entered into negotiations with the Lorain Board. After no resolution was

reached, the Ohio Department and the Lorain Board submitted separate proposals to the Court in early 1991.[3]

A hearing on the Lorain Board's Motion was held in April and May of 1991. Evidence presented at the hearing showed that since 1985 the Lorain Board had increased the scope of its magnet program and the number of students involved. The District Court concluded that it was necessary for the Lorain Board to move more than 650 students to maintain a viable desegregation program, despite the Lorain City School District's stable population, both in percentage of racial composition and geographic location. 768 F. Supp. at 1231 (A.40). In addition, by the spring of 1991, in addition to the approximately 1300-1350 students in "court ordered" magnet programs, there were an additional 2000-2200 students in "non-court ordered magnet programs."[4] As the District Court correctly noted:

> 7. Lorain has expanded its magnet school program beyond the magnet programs *necessary* to achieve the goals of the Consent Decree in the above-captioned case. Seventeen out of twenty-one schools in Lorain currently have magnet programs. . . . The additional magnet programs in place in the Lorain City School District help Lorain to maintain desegregation in its school district but are not necessary for Lorain to maintain compliance with the terms of the Consent Decree with respect to composition of student population.

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[3] Petitioners incorrectly contend that the record shows that the Ohio Department failed to negotiate. (Pet. at 10-11, 20). What the record reveals is simply that the negotiations were unsuccessful.

[4] "There are approximately 3,500 students involved in magnet programs in Lorain out of a total student population in the District of about 12,300 students." 768 F. Supp. at 1232. (A.41). This is in dramatic contrast to the 654 students initially identified in the Proposed Plan as the number needed to be moved to achieve the requisite racial composition. *See supra* at 5.

768 F. Supp. at 1231-1232 (A.41), (footnote and transcript citations omitted) (emphasis in original).

On June 21, 1991, the District Court issued a Memorandum Opinion and Judgment Entry ordering the Ohio Department to pay fifty percent of the Lorain Board's claimed desegregation costs for the 1989-90 school year, for a total of $2,600,917.00. 768 F. Supp. at 1244, 1245 (A.73). The District Court further ordered the Ohio Department to pay forty percent of the desegregation costs for the 1990-91 school year; thirty percent for the 1991-92 school year; twenty percent for the 1992-93 school year; and ten percent for the 1993-94 school year. 768 F. Supp. at 1246 (A.74).

The District Court estimated that the payments over the five years would total approximately nine million dollars. 768 F. Supp. at 1246 n.30 (A.74). The District Court provided the Lorain Board with leave to file an application for reimbursement for each of the remaining four school years and provided the Ohio Department thirty days to file objections challenging the accountings in the applications. 768 F. Supp. at 1246 (A.75). The District Court also ordered the Ohio Department to pay interest, at the rate prescribed by law, from the date of the Judgment Entry, unless the Ohio Department paid the principal amount of the initial judgment, $2,600,917.00 within sixty days. *Id.*

The Ohio Department appealed to the Sixth Circuit, asserting that the District Court had erred as a matter of law by imposing additional financial obligations on the Ohio Department under the guise of modifying the Consent Decree.[5] Petitioner Lorain NAACP was not a party to the appeal because it had not followed the Sixth Circuit's rules for notice of appearance of counsel and had not timely filed a brief.

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[5] The Ohio Department also assigned as error several issues including the payment of interest and matters relating to the District Court's calculation of the additional financial obligation. These factual assignments of error were not ruled upon by the Sixth Circuit. *Lorain NAACP*, 979 F.2d at 1153 n. 5 (A.23).

In an Opinion issued November 12, 1992, the Sixth Circuit Court of Appeals reversed the District Court, holding that:

> . . . a district court may not, in the name of modification, circumvent the express terms of a defendant party's consent in the absence of an adjudicated or admitted violation of law. In the absence of an adjudication or admission of constitutional violation, the district court's authority to impose additional obligations on a defendant is constrained by the terms of agreement entered by the parties to the consent decree.

Lorain NAACP, 979 F.2d at 1153 (A.22). A motion for rehearing and suggestion for rehearing *en banc* was denied by the Sixth Circuit on January 5, 1993. (A.93).

REASONS FOR DENYING THE WRIT

I. THIS CASE DOES NOT WARRANT EXERCISE OF THIS COURT'S JURISDICTION WHERE THE LOWER COURT'S DECISION IS SUPPORTED BY SOUND PRINCIPLES OF PUBLIC POLICY AND PRESENTS NO CONFLICT WITH CASE LAW OF THIS COURT OR OTHER CIRCUIT COURTS

A. The Sixth Circuit's Decision Limiting A District Court's Ability To Expand A Consent Decree To Increase The Obligation Of A Party Where No Liability Has Been Admitted Or Adjudicated Is Supported By Sound Principles Of Public Policy

Petitioners attempt to disguise the Lorain Board's effort to fundamentally change the Consent Decree as merely a request to enforce or modify the Consent Decree when, in fact, what the Lorain Board asked the District Court to do was to vastly expand the obligations of the Ohio Department. Both Lower Courts acknowledged that the Consent Decree,

as expressly written, did not provide for any state funding beyond one million dollars. 768 F. Supp at 1243-1244 n. 24 (A.68-69); 979 F.2d at 1147 (A.9).

Petitioners incorrectly allege that the Sixth Circuit, in refusing to permit a modification which would have increased the Ohio Department's obligation from one million to nine million dollars, promulgated a new rule of law, without precedent which would eliminate a district court's power to modify a consent decree. (Pet. at 3). The Ohio Department has never contested the District Court's authority to adopt, enforce, or interpret a consent decree or modify it by reducing a party's obligations. As noted by the Sixth Circuit:

> [t]he state's appeal in this case did not challenge the district court's authority to modify a consent decree generally nor question the proper standard for modification; it is concerned instead with the court's authority to modify the decree by substantially increasing the State's burden, over its objection and without any finding or acknowledgment that the State has violated the Plaintiff's constitutional rights.

979 F.2d at 1150 (A.15).

In addressing this issue the Sixth Circuit held:

> [A] district court may not, in the name of modification, circumvent the express terms of a defendant party's consent in the absence of an adjudicated or admitted violation of law. In the absence of an adjudication or admission of constitutional violation, the district court's authority to impose additional obligations on a defendant is constrained by the terms of agreement entered by the parties to the consent decree.

979 F.2d at 1153 (A.22). The decision of the Sixth Circuit prevents radically different obligations from being imposed on a governmental defendant, which entered into and has

fully complied with a consent decree, but which never had an opportunity to defend itself on the issue of liability and was never found liable for any constitutional violation. This holding is a reasonable method of balancing the interests of the parties to institutional reform litigation. To hold otherwise would mean that a governmental agency could be required to take action, including the expenditure of public money, far in excess of what it had originally agreed to settle the litigation.

Contrary to Petitioners' assertion, it is this unlimited potential for increased obligations on a defendant, not the unavailability of such increases at the request of plaintiffs or co-defendants, which would have a chilling effect on parties' willingness to enter into consent decrees. Unless a party can be certain that the terms of its compromise will not be altered in a manner which increases its obligations, it cannot reasonably be expected to give up its right to establish its lack of liability at trial.[6]

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[6] Petitioners make several inaccurate statements about the significance of the use of a liability disclaimer provision in the Consent Decree. First, Petitioners state that the Sixth Circuit viewed the disclaimer as pivotal to its decision. (Pet. at 17). However, what the Sixth Circuit viewed as pivotal was that the Ohio Department had not admitted or been adjudicated liable of a constitutional violation. The disclaimer illustrates this but was not the basis for the Sixth Circuit's reversal of the District Court.

Petitioners then assert that a disclaimer is to be given very little weight, citing *Stuart v. Roche*, 951 F.2d 446 (1st Cir. 1991), *cert. denied*, 112 S. Ct. 1948 (1992), and *Donaghy v. City of Omaha*, 933 F.2d 1448 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 938 (1992) in support of this conclusion. (Pet. at 17-18). These cases do not support Petitioners' argument, however, as they are both factually and legally distinct. Both *Stuart* and *Donaghy* deal with third party reverse discrimination challenges to consent decrees. Both cases hold that the liability disclaimer does not mean that the consent decree cannot be considered remedial for purposes of withstanding third party challenges of reverse discrimination. Neither case stands for the proposition that all disclaimers are to be considered surplusage.

This is especially significant for governmental defendants which have ongoing obligations to carry out their activities in a constitutional manner and which also serve as stewards of the public's money. Ironically, the direct beneficiary of the sought after increased funding from the Ohio Department in this case is the Lorain Board, another governmental agency and a Co-Defendant in this litigation.

Contrary to Petitioners' suggestion, prior court decisions interpreting modifications of consent decrees in institutional reform litigation do not indicate that parties have been deterred from entering into consent decrees with governmental agencies or that more cases have not been settled and have gone to trial as a result of a court's inability to increase a governmental defendant's liability in the absence of an admission or an adjudication of a constitutional violation. Nor do Petitioners provide this Court with any rationale for their belief that the Sixth Circuit's decision will cause a chilling effect on parties' willingness to enter into consent decrees.

In fact, the Sixth Circuit's decision is consistent with the holdings of the other circuit courts of appeals that have considered this same issue. *See Walker v. U.S. Dept. of Hous. and Urban Dev.*, 912 F.2d 819 (5th Cir. 1990); *Rajender v. University of Minnesota*, 730 F.2d 1110 (8th Cir. 1984); *Fox v. Dept. of Hous. and Urban Dev.*, 680 F.2d 315 (3rd Cir. 1982); *see also San Francisco NAACP v. San Francisco Unified Sch. Dist.*, 896 F.2d 412, 415 (9th Cir. 1990). *See infra* at 15 - 19. No evidence has been presented from the experiences of these circuits that would validate Petitioner's claims of chilling effect. Moreover, the result urged by Petitioners could easily result in an increase in complex institutional reform cases that governmental entities would be compelled to adjudicate through lengthy, hard fought trials.

B. The Sixth Circuit's Holding That A District Court May Not Modify A Consent Decree To Substantially Increase A State's Burden Over Its Objections And Without Any Finding Or Admission That A State Violated Plaintiff's Constitutional Rights, Is Consistent With The Well-Settled Law Established By This Court.

The Sixth Circuit's decision in the present case is consistent with this Court's longstanding principle that federal judicial power "may be exercised 'only on the basis of a constitutional violation . . . . ' " *Milliken v. Bradley*, 418 U.S. 717, 738 (1974) (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971)). The principle that federal judicial power must be tailored to remedying a constitutional violation has been restated in this Court's more recent decisions. *Freeman v. Pitts*, 112 S. Ct. 1430, 1445 (1992); *Board of Educ. of Oklahoma City Public Schools v. Dowell*, 111 S. Ct. 631, 637 (1991).

Similarly, in *Rufo v. Inmates of Suffolk County Jail*, 112 S. Ct. 748, 762 (1992), this Court stated that "[f]ederal courts may not order States or local governments, over their objection, to undertake a course of conduct not tailored to curing a constitutional violation that has been adjudicated." Petitioners argue that the Sixth Circuit's decision eviscerates the flexible standard established by this Court in *Rufo* for modification of consent decrees and that this decision is a departure that will erode the flexibility needed to ensure dismantling of segregated institutions. (Pet. at 5, 7). The Sixth Circuit, examining the basic principles of consent decree interpretation and modification, clearly held that the less stringent standard enunciated in *Rufo* and *Heath I*, 888 F.2d 1105 (6th Cir. 1989) would apply to school desegregation cases. *Lorain NAACP*, 979 F.2d at 1149. (A.14). The recent Sixth Circuit decision of *Heath II*, clearly indicates that the Circuit understood and correctly applied *Rufo*. *Heath II*, No. 91-3778/92-3317, 1993 U.S. App. LEXIS 9933 at *13.

The Sixth Circuit decision in the case at bar is not a departure from the *Rufo* standard governing modifications. *Lorain NAACP,* 979 F.2d at 1148-49 (A.12-15). Rather, the Sixth Circuit determined that *Rufo* had not addressed the situation in which the modification sought to *increase* the obligations of a party. 979 F.2d at 1152-53, n.4 (A.20-22).[7] Therefore, the Sixth Circuit's holding is limited to cases seeking to impose an additional obligation on a party in the absence of an adjudication or an admission of a constitutional violation. This decision is consistent with the other courts of appeals which have addressed this issue and is not in contravention of this Court's decision in *Rufo.*

Moreover, the Sixth Circuit's decision is consistent with the decisions of this Court which have repeatedly reiterated the need for district courts to limit their involvement in school desegregation cases as the school district becomes unitary. *Dowell,* 111 S. Ct. at 637. This Court, in *Dowell,* cited the "all deliberate speed" language from *Brown v. Board of Educ.,* 349 U.S. 294, 301 (1955), and noted that "[f]rom the very first, federal supervision of local school systems was intended as a temporary measure to remedy past discrimination." 111 S. Ct. at 637. Thus, remedial orders in school desegregation cases "are not intended to operate in perpetuity." *Id.* Significantly, this statement was made in the context of a request by the Oklahoma City Board of Education to dissolve the desegregation consent decree.

The Sixth Circuit's decision in the present case prohibits a modification which would have increased the Ohio Department's financial obligation more than nine-fold, from one million to over nine million dollars, and which would have extended the Ohio Department's financial obligation for an additional five years. This increase and extension were ordered by the District Court at a time when all school

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[7] Even Petitioner admits that in the context of modification of a consent decree, this Court has never addressed a district court's ability to impose additional financial obligations on a governmental defendant. (Pet. at 14).

buildings in the Lorain City School District had been in compliance with the Consent Decree since the 1989-1990 school year and the Lorain Board had met all of its obligations under the Consent Decree except for the minority hiring goals.[6] Under these circumstances, the Sixth Circuit's reversal of the District Court's modification order furthers the important goal of removing the Lorain City School District from continuing federal court supervision, a supervision which has imposed obligations on the Lorain Board and the Ohio Department since 1984.

C. The Sixth Circuit's Decision Is Consistent With The Other Circuits Which Have Addressed The Issue Of Attempted Expansion Of A Party's Obligations Under A Consent Decree.

As pointed out by the Sixth Circuit in its Opinion, it could find no authority, and none was provided by Petitioner:

> . . . to support the contention that, absent an adjudication of constitutional violation, the State of Ohio is legally obliged, or may be judicially ordered over its objection, to increase its share of the costs of desegregation beyond the $1 million limitation establishing the terms and scope of its consent.

979 F.2d at 1153 (A.22). However, other circuit courts of appeals have addressed requests similar to the issue in this case, that is, the attempted expansion of a party's financial obligation under a consent decree. In each case the court of appeals reversed the district court's order expanding the consent decree.

In *Fox v. United States Dept. of Hous. and Urban Dev.*,

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[6] The money ordered to be paid by Ohio Department was reimbursement for the Lorain Board's expenses in operating its magnet programs and its bilingual program and, except for several hundred dollars, had nothing to do with minority hiring.

680 F.2d 315 (3rd Cir. 1982), the Third Circuit Court of Appeals considered an order by the district court modifying a consent decree by requiring defendant United States Department of Housing and Urban Development ("HUD") to allocate eleven million dollars to finance the rehabilitation and construction of lower income housing. HUD, like the Ohio Department, had never been found liable by either the consent decree or by a prior adjudication on the merits. The Court recognized that "[t]he plaintiffs have not sought enforcement of an existing term, but imposition of an additional term beyond the scope of HUD's consent." 680 F.2d at 322. In vacating the district court's modification order, the court reasoned that:

> Although we do not doubt the power of a court to modify an injunctive order entered by consent, we think that in the usual case *a court may not impose additional duties upon a defendant party to a consent decree without an adjudication or admission that the defendant violated the plaintiffs' legal rights* reflected in the consent decree and that modification is essential tc remedy the violation. . . . To impose additional duties under the decree because of those changes is to disregard the basic rights of litigants who waive their right to litigate defenses by consenting to have a decree entered against him. The conditions upon which rights are waived must be respected.

680 F.2d at 323 (emphasis added).

In *Rajender v. University of Minnesota*, 730 F.2d 1110 (8th Cir. 1984), the Eighth Circuit addressed an attempt to expand a party's liability beyond the consent decree. *Rajender* involved an employment discrimination suit brought by non-student employees against the University. Prior to the conclusion of the trial on the merits, the parties entered into a consent decree which among other things, set a $6,000. limit on attorney fees. Nine months later, the district court changed the decree, over the objections of the University, and expanded the University's liability to include "all

reasonable" attorney's fees without a limitation on the dollar amount. 730 F.2d at 1114. The Eighth Circuit reversed, stating that "[w]e cannot save the parties from a bad bargain, or from a bargain that they now claim was bad." 730 F.2d at 1117.

Most recently, *Walker v. United States Dept. of Hous. and Urban Dev.*, 912 F.2d 819 (5th Cir. 1990), the Fifth Circuit Court of Appeals was presented with the issue of whether it should expand a consent decree and impose upon HUD an additional financial obligation. As in the case at bar, the co-defendant to the consent decree, the Dallas Housing Authority, claimed that it could not continue the plan to address racial housing segregation in Dallas under the consent decree because another governmental entity and co-defendant, HUD, had drastically reduced its federal operating subsidy. The issue before the court was whether the decree should be expanded to require HUD to increase the subsidy.

The Fifth Circuit refused to impose this type of expanded liability and held:

> As a general principle, a consent decree is a product of negotiation and compromise entered into by parties with divergent purposes, but aligned for the simple reason of avoiding costly and protracted litigation. *See United States v. Armour & Co.*, 402 U.S. 673, 681-82, 91 S.Ct. 1752, 1757-58, 29 L.Ed.2d 256 (1971). The respective obligations of these parties are discerned strictly from within the decree's four corners, as written, and not from the articulated purposes of either party. *Id.* at 682, 91 S.Ct. at 1757.
>
> Nor are courts at liberty to redraft the obligations commanded by the decree absent consent of the parties.

912 F.2d at 825. The Fifth Circuit concluded that it was "not at liberty to modify the decree to bind HUD involuntarily

to additional financial obligations to which, as the court admits, the agency never agreed." The Fifth Circuit, relying on the Third Circuit, stated:

> As was the case in *Fox*, the parties "have not sought enforcement of an existing term, but imposition of an additional term beyond the scope of HUD's consent." Id. at 322. If the decree has been frustrated because the parties' respective fiscal obligations were not memorialized in writing, the decree should be vacated, renegotiated and, if impasse persists, the cause scheduled for trial.

912 F.2d at 827.

In each of these Circuits, the Courts of Appeals expressly held that a district court cannot expand a consent decree by imposing additional duties on one of the parties to a consent decree without an admission or adjudication that the party violated the plaintiffs' legal rights.[9] Moreover, Petitioners rely on *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, 896 F.2d 412 (9th Cir. 1990) to support their contention that a district court had authority to impose additional financial obligations on a government defendant when substantially changed circumstances warrant the modification. (Pet. at 12). *San Francisco NAACP* involved a challenge by a local school district to the state's reduction in funding for desegregation which had been established pursuant to a consent decree. The Ninth Circuit declined to expand the scope of the consent decree given its language

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[9] Petitioners state that *Fox*, 680 F.2d 315, and *Walker*, 912 F.2d 819, applied the *U.S. v. Swift & Co.*, 286 U.S. 106 (1932), strict standard of review, which is no longer in force. (Pet. at 17 n.2). Petitioners are incorrect because both *Fox* and *Walker* distinguish *Swift* and limit it to cases in which a defendant was seeking to be released from obligations imposed by a consent decree. *Fox* and *Walker* both involved the imposition of new burdens on a defendant and are concerned with the court's authority, not the standard of review to be used. *Fox*, 680 F.2d at 323; *Walker*, 912 F.2d at 827. The relaxation of the strict *Swift* standard of review did not affect the validity of either of these cases.

and the lack of extrinsic evidence as to the intent of the parties. 896 F.2d at 415. Similar to the other circuits considering this issue, the Ninth Circuit "note[d] courts have generally been reluctant to impose affirmative funding obligations on governments where those obligations exceed the express terms of a consent decree." *Id.* (*citations omitted*).

Accordingly, the Sixth Circuit's holding in this case that a district court cannot modify a consent decree to impose new and substantially burdensome obligations on a party without that party's consent, in the absence of an admission or adjudication of constitutional liability by that party breaks no new ground. It is entirely consistent with the holdings of the other circuits which have addressed this issue.

II. THE SIXTH CIRCUIT APPLIED THE CORRECT STANDARD OF APPELLATE REVIEW AND NO INSTRUCTION IS NEEDED FOR THE LOWER COURTS

Petitioners' second suggested reason for granting certiorari is that it would provide this Court an opportunity to instruct the district and appellate courts on the proper standards for appellate review. This opportunity is not needed because it is Petitioners, rather than the Sixth Circuit, which misunderstand the role of the appellate court in reviewing decisions of the district court.

The Sixth Circuit held that in circumventing the express terms of the Consent Decree, the District Court abused its discretion. Petitioners argue that the Sixth Circuit erred in using this standard of review. (Pet. at 23). Petitioners are wrong on this point, since abuse of discretion is the appropriate standard of appellate review and the Sixth Circuit applied it correctly in this case.

A consent decree is a form of injunctive relief, and an appellate court's power of review is derived from 28 U.S.C. 1291(a)(1). *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 757 (1986), *overruled on other grounds, Planned Parenthood of Southeastern Penn.*

v. Casey, 112 S. Ct. 2791 (1992). A court of appeals reviews a district court's decision concerning a consent decree only to see if the district court abused its discretion. *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 417-18 (1977); Fed. R. Civ. P. 52. Abuse of discretion may be shown by demonstrating that the district court relied on clearly erroneous findings of fact, or improperly applied the law or relied on an erroneous legal standard. *Id. See also Black Law Enforcement Officers Ass'n v. Akron*, 824 F.2d 475 (6th Cir. 1987).

In the present case, the Sixth Circuit clearly stated that it reviewed the District Court's decision on an abuse of discretion standard. *Lorain NAACP*, 979 F.2d at 1153 (A.23). The Sixth Circuit found that the District Court had improperly applied the law and overstepped its authority by imposing additional obligations on the Ohio Department in the absence of an admission or adjudication of a constitutional violation. 979 F.2d at 1153 (A.23). This legal error constituted an abuse of discretion. *Dayton Bd. of Educ.*, 433 U.S. at 417-18.

Because the Sixth Circuit held that the District Court applied the wrong legal standard and therefore abused its discretion, the Sixth Circuit did not have to review the District Court's factual findings. While the Sixth Circuit indicated that it agreed with many of the District Court's findings, such as the finding that the Consent Decree clearly limited the Ohio Department's obligation to one million dollars, the Sixth Circuit explicitly refrained from addressing many of the factual issues because its legal analysis justified finding an abuse of discretion on the part of the District Court. The Sixth Circuit based its conclusion, that the District Court had abused its discretion, on a finding that the District Court had applied the wrong legal standard and not on any review of the District Court's factual findings.

Thus, the Sixth Circuit identified and correctly applied the right standard of review. There is no need for this Court to grant this Petition to instruct the appellate courts on this issue.

CONCLUSION

For all the aforementioned reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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